

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**LANDWORKS CREATIONS, LLC**

**Plaintiff,**

**V.**

**UNITED STATES FIDELITY &  
GUARANTY COMPANY**

**Defendant,**

**C.A. No. 4:05-CV-40072-FDS**

**UNITED STATES FIDELITY AND GUARANTY COMPANY’S MEMORANDUM OF LAW IN SUPPORT  
OF ITS MOTION FOR LEAVE TO FILE AN AMENDED ANSWER AND COUNTERCLAIM**

Pursuant to Fed. R. Civ. P. 15, United States Fidelity and Guaranty Company (“USF&G”) hereby moves this Court for leave to amend its Answer to Landworks Creations, LLC’s (“Landworks”) Verified Complaint and to file a counterclaim. USF&G’s proposed Amended Answer and Counterclaim is attached to the Motion filed herewith as Exhibit 1.

## I. FACTUAL BACKGROUND

Landworks commenced suit against USF&G on or about April 11, 2005 in Worcester Superior Court in Civil Action No. WOCV2005-01132. Essentially, Landworks asserts a payment bond claim against USF&G regarding site work performed at the Shrewsbury Middle School Construction project (“the “Project”).

On or about May 16, 2005, USF&G filed a Notice of Removal. Thereafter, Landworks filed a Motion to Remand, which was denied on or about November 15, 2005.

During its investigation of Landworks' claim, USF&G has discovered that a substantial portion of the work that Landworks had performed at the Project was substandard and unworkmanlike. After the filing of Landworks' Verified Complaint, USF&G retained G&R Construction, Inc. ("G&R") to complete the remaining work at the Project, including but not limited to finishing and correcting Landworks' substandard work. USF&G has discovered that the cost to finish and correct Landworks' substandard work, which will not be completed until approximately May, 2006, is well in excess of the amount that Landworks is seeking in its Complaint and well in excess of the amount left to be paid to Landworks under its subcontract.

Pursuant to an agreement made after the filing of Landworks' Verified Complaint, Jackson Construction Company ("Jackson"), with which Landworks had executed a subcontract, assigned all of its rights and claims against Landworks for damages or other relief arising out of or in connection with the Project to USF&G.

A Scheduling Conference was held on December 13, 2005, and a Scheduling Order was entered on January 5, 2006. Under the Scheduling Order, the deadline to file motions to amend pleadings is February 17, 2006.

## II. ARGUMENT

Leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. Rule 15(a); See also Subaru Distrib. Corp. v. General Ship Corp., 167 FRD 342, 434 (D. Mass. 1996) (leave to amend must be freely given when justice requires). The decision concerning whether to grant the motion to amend lies entirely within the Court's discretion, and the Court should be guided by the underlying reasons for allowing the amendment to facilitate a decision on the merits. Film Tec Corp. v. Hydranautics, 67 F.3d 931, 935 (Fed. Cir. 1995) *cert.*

*denied*, 519 U.S. 814 (1996) (court must be guided by the underlying purpose of Rule 15 and facilitate decision on the merits rather than technicalities).

Under the circumstances, justice requires that USF&G be allowed amend its answer and assert a Counterclaim, in its own capacity and as assignee of Jackson. The additional defenses and counterclaim were discovered during the course of USF&G's investigation of Landworks' claim, and could not have been asserted at the time of USF&G's original Answer. In addition, USF&G's present motion to amend is timely under the Scheduling Order. Finally, Landworks will not be prejudiced if USF&G's motion is allowed.

### **III. CONCLUSION**

For the foregoing reasons, United States Fidelity and Guaranty Company requests that this Court allow its Motion for Leave to File an Amended Answer and Counterclaim to assert additional defenses against Landworks' Verified Complaint and to assert a counterclaim against Landworks.

Respectfully submitted,

**UNITED STATES FIDELITY &  
GUARANTY COMPANY**

/s/ Eric C. Hipp

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Dated: February 17, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants (none) on February 17, 2006.

/s/ Eric C. Hipp

Eric C. Hipp

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